



The Supreme Court
OF THE
United States

OCTOBER TERM, A. D. 1943

No.

M. P. DEPAOLI and LENA DEPAOLI,
his wife,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

**(A) STATUTORY PROVISIONS TO SUSTAIN
JURISDICTION**

The jurisdiction of the United States Supreme Court is invoked under Section 240(a) of the Judicial Code as amended, 28 U. S. C. A. 347, and under the Act of June 7, 1924, Chapter 311, 43 Stat. 596; 25 U. S. C. A., Section 421 (note), Appendix A.

(B) OPINIONS BELOW

The opinion of the United States District Court for the District of Nevada containing an extensive survey

of the facts involved in the instant proceeding was entered on the 23d day of November, 1942 (R. 223).

The judgment of the United States District Court for the District of Nevada was entered on the 11th day of February, 1943 (R. 247). This case is reported in 47 Fed. Supp. 688.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered on the 9th day of December, 1943 (R. 267). This case is reported in 139 Fed. (2nd) 225.

(C) STATEMENT OF FACTS

The essential facts of this case are not in dispute. The action involves the right to possession of certain real property located in Washoe County, Nevada, and was instituted in the District Court of the United States for the District of Nevada on the 4th day of February, 1938 (R. 2).

For approximately seventy-seven years prior to the institution of said action and since the year 1861, the real property in question has been in the exclusive and undivided possession of petitioners and their immediate predecessors in interest who have continuously tilled, cultivated and irrigated the same and broken and cleared the same from uncultivated raw land. During said period of time said petitioners and their immediate predecessors in interest have improved the same and constructed buildings, fences, ditches and dams thereon and used in connection therewith (R. 232).

At the time said real property forming the subject

matter of this action was settled upon, the public surveys had not been extended to include said lands, and the same were open and unsurveyed (R. 232). Subsequent to the settlement of said real property there was established what is known as the Pyramid Lake Indian Reservation by executive order of March 23, 1874. The real property in question is included within the exterior boundaries of said Pyramid Lake Indian Reservation, although the Indians for whom said reservation was created have never occupied, used or improved the same and have never been in possession thereof.

On June 7, 1924, the Congress of the United States passed an act entitled "An Act for the Relief of Settlers and Townsite Occupants of Certain Lands in the Pyramid Lake Indian Reservation, Nevada," being Chapter 31, Public Laws of the United States (43 Stat. 596, Chapter 311). A copy of said Act is appended hereto and forms Appendix A. Said Act was passed expressly for the relief of petitioners herein and for the relief of other white settlers similarly situated. Pursuant to the terms and provisions of said Act and on March 3, 1925, M. P. Depaoli, one of the petitioners herein, who is recognized as a qualified applicant under said Act, made petition to purchase the real property involved herein, and in June of said year 1925, said applicant made a quarter-payment upon the total appraised value of said real property, said payment being in the sum of \$2,514.82. The application of said petitioner was allowed and said initial quarter-payment was retained. Thereafter, by reason of adverse economic conditions and through no fault of said petitioner

(R. 244), no additional payments were made upon the purchase price of said real property and the General Land Office allowed the matter to remain in status quo although for the period from 1925 until March 10, 1936, various and sundry arrangements for payment were made and negotiations were had regarding the purchase of said property. On March 10, 1936, the General Land Office notified said applicant that the Secretary of the Interior had ruled that all interest due on the unpaid principal was required to be paid within thirty days and that one-third of the remaining principal was required to be paid within six months and that failing said payments the application of petitioner would be cancelled without further notice (R. 240).

Said applicant failed to make said payment of interest and principal pursuant to said last-named ruling of the Secretary of the Interior and on May 13, 1936, said Secretary of the Interior ordered the cancellation of petitioner's application.

Following said date and on August 11, 1936, said petitioner paid the full balance of the purchase price of said real property including interest, said payment being made to the Register of the United States Land Office at Carson City, Nevada. Said final payment, including interest, in the sum of \$5,116.62 was forwarded to the United States Land Office in Washington and duly and regularly deposited with the Treasurer of the United States, where the same was retained until April 17, 1939, after the institution of this action, upon which last-named date a tender of said final payment was made to said petitioner which tender was refused by

said petitioner (R. 227, 243). No tender of the initial payment of \$2,514.82 has ever been made to petitioner.

Upon the basis of the foregoing facts, the District Court of the United States for the District of Nevada determined that an entry had been made upon the real property in question by said M. P. Depaoli, as a result of which a contract arose as between said M. P. Depaoli and respondent herein, which said contract created the relationship of vendor and vendee as between the parties thereto. Said trial court further determined that said contract, as a valid and subsisting property right, could not be forfeited under the circumstances herein presented by the arbitrary ruling of the Secretary of the Interior, but that the same could only be terminated pursuant to general equitable principles governing suits for cancellation of conveyances and the rescission of contracts (R. 229).

Upon appeal, the United States Circuit Court of Appeals for the Ninth Circuit reversed the judgment of the District Court of the United States for the District of Nevada upon the basis of the decision of *United States vs. Garaventa Land and Livestock Company*, 129 Fed. (2nd) 416; (Appendix B), in which said last-named case Circuit Judge Healy dissented. Said decision of said Circuit Court of Appeals in the instant proceeding was written by said Judge Healy (R. 267). It will be noted that said Judge Healy, who had dissented in the case of *United States vs. Garaventa Land and Livestock Company*, stated that he was still of the same opinion as expressed in his dissenting opinion in said case of *United States vs. Garaventa Land and Live-*

stock Company, but that he was bound by the decision of said Circuit Court of Appeals in said case.

(D) SPECIFICATION OF ERRORS

The United States Circuit Court of Appeals for the Ninth Circuit erred in the following particulars, to-wit:

(1) In holding that petitioner acquired no property rights in the property involved by the making of his entry thereon in the manner herein set forth.

(2) In holding that the entry in question did not create a vendor-vendee relationship between respondent and petitioner.

(3) In holding that equitable principles are inapplicable as between respondent and petitioner in connection with the cancellation of petitioner's contract of purchase and the forfeiture of his property rights thereunder.

(4) In holding that the Secretary of the Interior had the authority to arbitrarily declare a forfeiture of petitioner's right in the real property in question under the provisions of the Act of June 7, 1924, Chapter 311, 43 Stat. 596, 25 U. S. C. A., Section 421 (note).

(E) ARGUMENT

It is petitioners' contention that the writ of certiorari should be granted by reason of the aforesaid errors committed by the United States Circuit Court of Appeals for the Ninth Circuit, which said errors have resulted in the destruction of a property right existing in petitioners contrary to the provisions of the Fifth

Amendment to the Constitution of the United States of America since the destruction of said property right has been effected without due process of law.

Since an early date it has been well established by a long line of authorities that when an entry has been made upon real property forming a portion of the public domain, the individual making said entry "acquires an inceptive right to a portion of the unappropriated soil of the country by the filing of his claim ***." See *Chotard vs. Pope*, 12 Wheat. (U. S.) 586.

In the case of *Witherspoon vs. Duncan*, 71 U. S. 210 (4 Wall. 210), this Court in 1867 determined as follows:

"In no just sense can lands be said to be public lands after they have been entered at the Land Office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the Government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right upon the buyer, and is a void act. According to the well-known mode of proceeding at the Land Offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The Government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title."

It will be noted in said last-named case that no distinction was made between a cash and a donation entry.

This Court held in said case that whether the entry be a cash entry or a donation entry, that when the same was made, irrespective of its nature, the particular land in question became "segregated from the mass of public lands, and becomes private property." See also:

Orchard vs. Alexander, 157 U. S. 372, 383;

McMichael vs. Murphy, 197 U. S. 304;

Whitney vs. Taylor, 158 U. S. 85;

Sturr vs. Beck, 133 U. S. 541;

The Hastings & Dakota Railroad Company vs. Whitney, 132 U. S. 357;

Denny vs. Dodson, 32 Fed. 899;

McCune vs. Essig, 118 Fed. 273;

U. S. vs. Northern Pacific Railway Company, 204 Fed. 485.

It is petitioners' contention under the authorities hereinabove set forth that when petitioner's application for purchase was filed and accepted and when his initial cash payment was made upon the purchase price of the real property in question, the "entry" upon said real property was completed and that immediately there arose in petitioner a property right in the real property in question which said property right is of a particularly substantial character in view of the fact that the same is coupled with a partial payment. If a property right exists when an entry is made under the General Land Laws regardless of the payment of money, an a fortiori case is presented for the creation of a property right when a partial payment is made concurrently with the making of the "entry." There can be no question but that petitioner herein acquired a property right in the real property involved as soon as

his partial payment had been made upon the purchase price established for said real property. As a result of said application for purchase and its acceptance, and as a result of the partial payment upon the purchase price, a contract arose as between respondent and petitioners creating the relationship of vendor and vendee.

It is well settled that general principles of equity will ordinarily govern in suits instituted by the United States of America to secure the cancellation of a conveyance or the rescission of a contract. To this effect see the following cases:

Pan American Petroleum Company vs. U. S., 273 U. S. 456, 506;

U. S. vs. Detroit Lumber Company, 200 U. S., 321, 339;

United States vs. Stinson, 197 U. S. 200, 204;

Reading Steel Casting Company vs. U. S. 268 U. S. 186.

An exception to the rule that equitable principles will be applied in suits by the United States to secure the cancellation of contracts exists in cases wherein the application of such equitable principles will operate to frustrate the purpose of a law of the United States or to circumvent public policy. See

Pan American Petroleum Company vs. U. S.,
supra;

Causey vs. U. S., 240 U. S. 399, 402;

Heckman vs. U. S., 224 U. S. 413, 446;

U. S. vs. Trinidad Coal Company, 137 U. S. 160, 170.

It cannot be denied that in the instant proceeding a

contract existed as between respondent and petitioner for the purchase of the real property involved in this proceeding. To determine whether or not said contract may be arbitrarily cancelled in derogation of all equitable principles, we must first ascertain whether or not the application of equitable principles will frustrate the purpose of a law of the United States or circumvent public policy. Since the proceeding in question is predicated upon an act of Congress, namely, the Act of June 7, 1924, Chapter 311, 43 Stat. 596, 25 U. S. C. A., Section 421 (note), herein referred to, it is petitioners' contention that said Act speaks for itself in determining its purpose and in determining the public policy regarding the matters covered thereby. The Act is entitled "An Act for the Relief of Settlers and Townsite Occupants of Certain Lands in the Pyramid Lake Indian Reservation, Nevada." The purpose of said act is indicated by its title. Said Act has no purpose other than to make it possible for petitioners and other persons similarly situated to acquire title to the real property which they and their predecessors in interest had occupied, cultivated and improved for a period of time extending beyond the creation of the Indian reservation within whose boundaries said real property is situated.

In view of the express purpose of said Act, which is declaratory of the public policy of the United States regarding the situation in question, it is impossible to arrive at any conclusion other than that no purpose of any law of the United States would be frustrated and no public policy would be circumvented by an application of the general principles of equity in connection

with the cancellation of the contract in question. Since no law of the United States is frustrated and since no public policy of the United States is circumvented, the general principles of equity must be applied in determining the rights of the parties under the contract in question in view of the authorities hereinabove referred to.

In connection with the respective equities of the parties hereto, we wish to point out that as late as December 19, 1929, the Commissioner of Indian Affairs addressed a memorandum to the Secretary of the Interior which said memorandum appears in the printed report of hearings before the Committee on Indian Affairs, United States Senate, in the year 1937, in connection with Senate Bill 840. Said memorandum in part reads as follows:

"The white settlers have only such legal rights as were extended to them by the Act of June 7, 1924, but their equities are unquestioned and in view of all the facts and circumstances of this case, not one of them may be charged with bad faith***. The Indians were not in possession when the white settlements were made, the boundary lines of the reservation were not clearly established, the Government offered no opposition to the settlers, and their claims were bought and sold much in the same manner of privately-owned lands. The new purchasers took possession and no objection appears to have been raised by the Government" (R. 244).

In view of this expression of the Commissioner of Indian Affairs, in view of the fact that petitioners have paid the full amount of the purchase price of the property in question, and in view of the fact that respondent will suffer no prejudice by a specific enforcement of the

contract in question, how can it be said that equitable principles will be best served by permitting the forfeiture of petitioners' property and contract rights and by permitting the forfeiture of their initial payment, no portion of which has been tendered in connection with the cancellation of their contract?

In this connection we refer to the case of *U. S. vs. Budd*, 43 Fed. 630, 144 U. S. 154, wherein the following language is used:

"In considering the merits of the first of the several grounds for canceling the patent, it is important to keep in mind that this is not like a proceeding to rescind a contract. The government has not offered to return the money it received for the land; and, while it seeks to be restored to its original title and possession, it does not pray to have the parties on both sides placed in the position which they occupied before its officers and agents granted Budd's application to enter the land under this statute, and accepted the money. The case is prosecuted to secure an absolute forfeiture of all the defendants' interests in the land, as well as the money paid for it, and proceeded under the theory that whatever is illegal and wrong in the transaction is chargeable solely to the defendants. Now, if all that is claimed by the government as constituting the first ground for canceling the patent, both as matter of fact and of law, were conceded, the court would be unable to find any such fraud intended, or misconduct on the part of the defendants, as would afford either legal or equitable cause for the confiscation of their property. At most it is only claimed that this particular land, by reason of having been once offered at public sale, is excluded from sale under the Act of June 3, 1878. If this is so, the sale of it to Budd under this statute was an error, but only an error, and one for which the officers and agents of the government are chiefly

responsible; for upon them is cast the duty of administering the law according to its provisions, and of holding all persons seeking to obtain title to lands from the government to a compliance with the laws and regulations prescribed for the determination of their rights. When the government of the United States seeks relief from a court of equity, it is as much bounden as any individual suitor by the rules of equity; it can obtain such relief only when entitled to it upon principles of equity and good conscience. *U. S. vs. White*, 17 Fed. Rep. 273, 8 Sup. Ct. Rep. 850. It cannot, to correct a mere error in a transaction not tainted with crime and fraud, perpetrate so grave a wrong on its part as to deprive its adversary of valuable property or a sum of money without any compensation or equivalent therefor. If this were a suit between two private individuals the plaintiff would not be equitably entitled to a rescission of his contract and restoration of his title to the land without first on his part repaying the purchase money which he had received; and by the same rules of equity and justice the right to the government to recover this land, and also to hold the purchase money paid for it, must be denied, unless a forfeiture of the defendant's rights on the ground of fraud or willful misconduct can be shown."

It is conceded that as between an ordinary vendor and vendee a forfeiture would not be decreed in equity under the circumstances presented by the instant proceeding. To this effect see the following authorities:

Mosso vs. Lee, 53 Nev. 175; 295 Pac. 776;

Clark vs. London Assur. Cor., 44 Nev. 359; 195 Pac. 809;

Lake vs. Lewis, 16 Nev. 94;

Bishop vs. Stewart, 13 Nev. 25;

Irvine vs. Hawkins, 20 Nev. 384;

First Federal Trust Company vs. First National

Bauk, 295 Fed. 353 at 357 (C. C. A. 9, from Nev.);

Pomeroy's Equity Jurisprudence (5th Ed.), Vol. 2, Sec. 445, page 301 et seq.

The mere fact that the United States is the vendor is not an adequate reason for refusing to apply equitable principles in connection with the termination of said contract. See *United States Harness Company vs. Graham*, 288 Fed. 929. Failure to apply equitable principles in connection with the cancellation of the contract in question amounts to a deprivation of petitioners' property without due process of law. To this effect see the case of *Walker vs. McLoud*, 204 U. S. 302.

Petitioners further contend that in any event the statute of June 24, 1924, herein referred to does not authorize the Secretary of the Interior to arbitrarily declare a cancellation of the contract in question. In this connection it will be noted that the statute itself makes no provision for the cancellation of an entry duly made. The only power conferred upon the Secretary of the Interior by said statute for the recovery of the possession of any of the real property referred to in said statute is contained in subsection 4 of said statute, which provides as follows:

"That where an entry is not made within the time specified, the United States shall enter upon the premises and take possession thereof for the use and benefit of the Pinte Indians of Pyramid Lake Indian Reservation."

It is clear that if an entry was not made within the time provided by said statute, the right of entry and possession immediately arose. However, in all cases

where an entry was made within the time specified, a contract arose, the cancellation of which could not be declared under the provisions of said statute.

No right of possession and no right of entry can be created by rule or regulation contrary to the express provisions of said statute itself. Since the entry of petitioners in the instant proceeding was made within the time specified, said entry gave rise to a valid contract as hereinabove noted. Once said contract came into existence the right to take possession conferred by the statute no longer existed and thenceforth said contract must be dealt with as any other contract creating a vendor-vendee relationship.

While it is true that the Secretary of the Interior promulgated rules and regulations governing the purchase of the real property in question, none of said rules or regulations provided for a forfeiture or any method for the termination of contracts created under said statute. If it be said that a forfeiture may be declared in the absence of any express provision therefor, then it may with equal force be said that the Secretary of the Interior to satisfy any passing whim might from time to time promulgate rules or regulations the effect of which would utterly destroy the very purpose of the Act and thereby frustrate the legislative intent of Congress, whose sole purpose was to provide aid and relief for petitioners and other persons similarly situated. Any rules and regulations adopted under said Act must be authorized by the Act itself and any rules or regulations purporting to assume or take power in excess of the statute are void. See

Morrill vs. Jones, 106 U. S. 466;

Campbell vs. U. S., 107 U. S. 407;

Williamson vs. U. S., 207 U. S. 425;

Meads vs. U. S., 81 Fed. 684;

United States vs. George, 228 U. S. 14.

In the case of *Michigan Land and Lumber Company vs. Rust*, 168 U. S. 589, this court states as follows:

"It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title."

It will not be denied that redress can always be had in courts when the officers of the Land Department have withheld from a pre-emptioner his rights, when they have misconstrued the law, or when any fraud or deception was practiced which affected their decision. See *Halley vs. Diller*, 178 U. S. 476, 490; *Sanford vs. Sanford*, 139 U. S. 642, 647.

If the decision of the United States Circuit Court of Appeals is permitted to remain unreversed, the ranching unit built around the real property in question will be completely destroyed, resulting in a situation wherein petitioners will own and occupy alternate legal subdivisions with the real property in question, in a more or less "checkerboard" fashion. This situation will prevent the practical and economical use of any of the real property by either petitioners or by the Indians, for whose benefit the Pyramid Lake Indian Reservation was created.

As heretofore indicated, the dams and ditches were constructed for the purpose of irrigating the ranching

unit involved as a single operating property. The removal of the real property involved in the instant proceeding will destroy the entire irrigation system and the usefulness thereof, insofar as both parties are concerned, thereby making it impractical without the expenditure of large sums of money to irrigate not only petitioners' patented property, but also the real property involved in this suit in the event the same should be held to belong to respondent.

The use has already been recognized in petitioners to use the water upon all of the land involved in the unit, in the case entitled "The United States of America vs. Orr Water Ditch Company, et al, In Equity, Docket A-3, United States District Court for the District of Nevada" (Unreported) (R. 241).

In conclusion, therefore, petitioners respectfully urge that the decision and decree to which the petition for Writ of Certiorari is directed is contrary to and in conflict with prior decisions of this court, that the same is contrary to and in conflict with prior decisions of other Circuit Courts of Appeal, that the same is contrary to and in conflict with generally established principles of equity and that the same is erroneous and subject to reversal.

Dated: Reno, Nevada, February....., 1944.

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(Appendix Follows)